#234

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE,
R.S.O. 1980, CHAPTER 340, AS AMENDED

AND, IN THE MATTER OF THE COMPLAINT MADE BY KAREN REESE OF LONDON, ONTARIO, ALLEGING DISCRIMINATION BECAUSE OF RACE IN ACCOMMODATIONS BY LONDON REALTY AND RENTALS LIMITED, ITS SERVANTS AND AGENTS; AND W.G. DAVIES, MANAGER; AND SHIRLEY CLEMENT, AGENT

Board of Inquiry: Dr. D.J. Baum

Appearances:

Ontario Human Rights Commission -
Luba Kowal, Counsel

Respondents -
R.J. McKinnon, Counsel

Hearings: November 4 and 5, 1985 - London, Ontario

Introduction

I was appointed a Board of Inquiry to hear and decide the above-noted complaint in accordance with the then prevailing Human Rights Code.

The thrust of the complaint is that Mrs. Reese was discriminated against in terms of rental housing advertised and made available to the general public by the Respondents on June 5, 1981. Specifically, Mrs. Reese stated in her complaint that she saw and responded to an advertisement for rental housing on June 5, 1981 in the London Free Press.

Her initial response to the advertisement was by telephone to the Respondent, Mrs. Clement. Mrs. Reese said she was told by Mrs. Clement not only that the advertised home was available, but so were two others, all located in the same vicinity. Mrs. Reese stated that she was denied the right to view the advertised home and, as well, the other two homes, all because of her race.

According to the complaint, these acts were said to be in violation of Section 3(1)(a) and (b) of the Human Rights Code applicable to this matter:

> "3(1) No person directly or indirectly alone or with another, by himself or by the interposition of another, shall,
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> > (a) deny to any person or class of persons, occupancy of any commercial unit or any housing accommodation; or
> >
> > (b) discriminate against any person or class of persons with respect to any term or condition of occupancy of any commercial unit or any housing accommodation.
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> because of race, creed, colour, sex, nationality, ancestry or place of origin of such person or class of persons or of any other person or class of persons. 1972, c. 119, s. 4 part."

The Respondents answered that there was no discrimination because of race. Rather, the policy of London Realty Managements & Rentals Ltd. was not to condone discrimination in the rental of its properties. There was no authorization, I was told, on the part of any employee of the Respondent Company to discriminate. Moreover, said Mrs. Clement, as an employee and

as an individual she was always willing to rent to any qualified applicant.

Early in the hearing, the Respondents questioned whether the complaint should have been proceeded with by the Commission within the meaning of Section 33(1)(d) of the Human Rights Code:

> "Where it appears to the Commission that
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> * * *
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> (d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay,
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> the Commission may, in its discretion, decide to not deal with the complaint."

The alleged incidents of discrimination took place in June 1981. Soon after Mrs. Reese confirmed what she and her husband believed was a violation of her rights under the Human Rights Code, they employed counsel. For about sixteen months counsel investigated the claim both as to the law and the facts. During that time period, it is fair to say that the Respondents were aware both of Mrs. Reese's belief that her rights under the Human Rights Code had been violated, and of the fact that she intended to pursue a remedy.

The Respondents, in the result, had to know proximate to June 1981 that their actions were being called into question. In effect, they were in potential legal jeopardy. Accordingly, it is not appropriate to argue, as the Respondents have, that they were faced for the first time with the need to gather information and subject memory to recall sixteen months after the alleged incidents of discrimination occurred.

Mrs. Reese and her husband pursued avenues of recourse in what they thought was a reasonable manner: the employment of counsel. It was nearly sixteen months after such employment that counsel informed the Reeses that, as a matter of law, he was unable to proceed with a private action against the Respondents under the Human Rights Code.

On November 24, 1982, Mrs. Reese presented herself before the Human Rights Commission to make her complaint. The time span between the happening of the alleged incidents of discrimination and Mrs. Reese's appearance before the Commission was reviewed by Anita Dahlin, Commission Divisional Supervisor for Southwestern Ontario. In the result, she found no fault with Mrs. Reese for employing and relying on counsel.

I believe there is ample evidence to support Mrs. Dahlin's conclusions. This complaint involves matters which Mrs. Reese tried immediately to redress, and about which the Respondents were on early notice concerning their potential legal jeopardy.

Facts

Mrs. Reese is a forty-year-old black woman who lives in London, Ontario with her husband, Harold Reese, who is white, and their three children. Mrs. Reese is employed as a customer service representative in London, Ontario. In 1981, however, at the times relevant to the complaint, she was employed as a secretary at Cableshare, London, Ontario. In 1981, Mr. Reese was (and he continues to be) Director of Information Systems for a company located in Stratford, Ontario.

In June 1981, the Reese family was in search of another home. The residence they had rented for a number of years had been sold, and possession was required by the new owners on or about July 1981. The Reese family preferred a four-bedroom home, and there was a certain sense of crisis in finding adequate accommodations within the time-frame set for moving.

On June 5, 1981, Mrs. Reese found an advertisement which appeared in the London Free Press for a three-bedroom home in what all the parties described as the highly desirable area of Orchard Park.

The advertisement stated: "Three bedroom executive type home, large kitchen with separate dining room and den, living room with fireplace, garage, spacious grounds.

"Call London Realty Management and Rentals Ltd. 473-2891. After 5 p.m. and weekends: 685-3720. June 5, 1981." [This advertisement also appeared on June 3, 1981.]

Mrs. Reese telephoned one of the two telephone numbers listed in the advertisement, and she reached Mrs. Clement, an employee of the Respondent Company. Mrs. Clement volunteered more information concerning the home including the address, 34 Brentwood. In addition, and at her own initiative, she noted two other available Orchard Park properties, both of which are near 34 Brentwood. They are: 538 and 546 Middlewood Crescent.

Mrs. Reese and Mrs. Clement discussed the needs of the Reese family. In this regard, Mrs. Clement suggested that the basement might be converted to a fourth bedroom. Mrs. Clement believed, according to Mrs. Reese, that 34 Brentwood would best meet the needs of the Reese family.

However, Mrs. Clement suggested that Mr. and Mrs. Reese drive past the three homes. In terms of their needs and preferences, one might be more attractive than another. Each home had its own individual characteristics.

Though Mrs. Clement didn't say so to Mrs. Reese, it was her view that 34 Brentwood "looked the nicest. From the inside 546 [Middlewood] was definitely the nicest, and 538 [Middlewood] needed so much work that it really couldn't compare I don't think with the others."

Mrs. Reese agreed to follow the advice of Mrs. Clement. She and her husband drove past the three properties on Sunday, June 7th. They liked what they saw. Mrs. Reese telephoned Mrs. Clement at her home for an appointment on Monday, June 8th. There was some further discussion between Mrs. Reese and and Mrs. Clement concerning adaptation of available homes to the Reese family needs.

It was agreed that Mrs. Reese was to meet Mrs. Clement the next day, Monday, June 8th, at 1 p.m. at 34 Brentwood for an inspection of the house.

The evidence is clear that Mrs. Clement functioned as the only employee of the Respondent Company. She was not a secretary. Rather, she was responsible for renting the available properties controlled by the Company. She functioned under some general guidelines, but she functioned largely alone. For lengthy periods during the year, Mr. Davies, the chief executive officer of the Company, was not in London.

All that has been said to this point indicates highly interested renters on the part of the Reese family, and a willing real estate management agent acting in a professional manner with a view toward leasing available properties. It is what follows that gave rise to questions, concerns, and eventually this complaint.

The testimony of Mrs. Rebecca Heffernan, if accepted, clouds what has been stated. Mrs. Heffernan and her husband signed a lease application for the home at 546 Middlewood on June 10, 1981 for a term to begin August 1, 1981. The application was approved on June 11, 1981.

Mrs. Heffernan said she saw an advertisement for the above-mentioned three properties on June 2, 1981. On June 4th, Mrs. Heffernan telephoned Mrs. Clement concerning the properties with special reference to 34 Brentwood. Mrs. Heffernan said Mrs. Clement told her the property was already taken by "somebody from Toronto. . . ."

It was then, following an inspection of 546 Middlewood, that Mr. and Mrs. Heffernan decided to complete and sign the application for lease on that home.

If Mrs. Heffernan's testimony were to be accepted, the time sequence testified to by Mrs. Reese would be different. She would have telephoned Mrs. Clement on June 3rd. What is more to the point, the conversations between Mrs. Reese and Mrs. Clement; the appointment set for Monday, June 4th; and much of what followed from that appointment would not have taken place.

But, the uncontroverted facts are that Mrs. Clement did agree to meet Mrs. Reese at 34 Brentwood. The earlier telephone conversations leading to this meeting did take place.

Looking to the date of the Heffernan lease application of June 10th, and accepting the testimony of all the witnesses that the properties in Orchard Park were highly desirable and tended to move quickly, I am inclined to the view that the recollections of Mrs. Heffernan tended to be at a time proximate to June 10th. I view Mrs. Heffernan's recollection to be a mistake as to memory, though I do also note that there exists a personal relationship between Mrs. Clement and Mrs. Heffernan.

As I stated earlier, Mrs. Reese and Mrs. Clement agreed to meet June 8th at 1 p.m. at 34 Brentwood. Mrs. Clement said she would not have agreed to any appointment unless she had first made arrangements for a key to the premises. [The Respondent Company did not maintain keys to the homes of its lessees.] Mrs. Reese telephoned Mrs. Clement in the morning to confirm the appointment.

Mrs. Reese arrived shortly before Mrs. Clement. The front door to the home was opened, though the storm door was closed. The windows were also opened, and a dog inside the home was barking. The garage door was opened, and a car was parked in the driveway.

When Mrs. Clement arrived, she asked if the Complainant were Mrs. Reese. Then Mrs. Clement told her she did not have a key to the home. Mrs. Clement knocked on the front door; there was no answer. She then went to the back, and returned a few minutes later to say that the tenant was not in.

Mrs. Clement seemed to say that no key was provided because the tenants failed to honour their word and make one available at the time and date requested. I find it somewhat difficult to fully accept this testimony. The facts are that tenants had written the Respondent Company on May 29th asking for early termination of the lease. On the same day, Mr. Davies replied that he would try to sublet the property by July 1st, but if he failed to do so, the tenants would be responsible for the remaining rent on the lease. The tenants were under a positive motivation to facilitate the leasing.

It was clear that Mrs. Reese preferred 34 Brentwood. It was also clear, however, that she and her husband were interested in alternatives, just as Mrs. Heffernan was when she and her husband chose 546 Middlewood after finding that 34 Brentwood was not available. Accordingly, said Mrs. Reese, and I believe her testimony to be credible, she asked Mrs. Clement to allow an inspection of 538 and 546 Middlewood. Mrs. Clement replied that the properties were not available; they had been rented. At that point, Mrs. Reese left. There was no representation from Mrs. Clement that the key would soon be available for 34 Brentwood, and the other two properties , according to Mrs. Clement, had been rented.

Mrs. Clement gave a somewhat different version of the facts:

> Q. What were the discussions?
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> A. [Mrs. Clement] I told her [Mrs. Reese] that 538 [Middlewood] was available. I don't remember if I mentioned the other property [546 Middlewood]. I don't remember that. I mentioned it [538 Middlewood] was a four bedroom, and she was very disappointed about [34] Brentwood, about not getting in. So then I think it was left where I would try again with Mrs. Price [occupant at 34 Brentwood] to get into the house. [Emphasis added.]
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> Q. What was your next contact [with Mrs. Reese]?
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> A. By the time I got back to Mrs. Reese [34] Brentwood was gone; it had been rented. I think she called me and asked me if I had been able to get a key. By this time we were talking 538 Middlewood. And I had trouble getting keys for 538, terrible trouble. [Transcript pp. 205-206.]

If I were to accept Mrs. Clement's version of events, 34 Brentwood was open for rental on June 8th. There was an undertaking by Mrs. Clement to telephone Mrs. Reese when the keys for 34 Brentwood were available. Yet, Mrs. Clement, who alone was responsible for all property rentals of the Respondent Company, also stated that 34 Brentwood was rented in the early part of June. This was confirmed by Mrs. Heffernan who with her husband signed a lease application for 546 Middlewood on June 10th. That application was signed only after Mrs. Clement told her 34 Brentwood was not available.

The testimony of Mrs. Clement was that an oral promise had been made by her to rent 34 Brentwood in early June. The application for lease of 34 Brentwood, however, was dated August 1, 1981, and lease, itself, was not entered until August 12, 1981.

We were told it is the firm policy of the Respondent Company not to commit rental properties until the lease application, itself, is approved. Yet, Mrs. Clement apparently gave an oral undertaking to hold a property which she knew to be a prime location and, as such, easily rentable, for someone who had not formally obligated himself on the lease application until nearly two months later.

The inference that I draw from what has been described is that Mrs. Clement acted with unusual haste to rent 34 Brentwood after Mrs. Reese

evidenced a clear and emphatic interest in the property. Moreover, Mrs. Clement agreed to lease the property to another after she had indicated to Mrs. Reese that an effort would be made to obtain the keys to 34 Brentwood for an inspection by Mrs. Reese. It is my view that Mrs. Clement did not want to lease 34 Brentwood to Mrs. Reese.

Nor, it can be added, did Mrs. Clement want to lease either 538 or 546 Middlewood to Mrs. Reese, who was told by Mrs. Clement that both properties had been rented. In fact, as of June 8th, the properties had not been rented. The lease application for 546 Middlewood had not been completed by Mr. and Mrs. Heffernan until June 10th. And, as the evidence discloses without contradiction, 538 Middlewood was available through June 11th.

The question now is why did Mrs. Clement not want to rent any of the three properties to Mrs. Reese? If the events are followed chronologically, the reason becomes clear. Mrs. Reese discussed the events of June 8th with her husband that evening. Apparently, he had his suspicions and, as a result, he telephoned Mrs. Clement, using another name, and inquired about recently advertised rental property in Orchard Park. Mrs. Clement indicated that two properties were available: 538 and 546 Middlewood. 34 Brentwood had been rented.

A time was selected convenient for Mrs. Clement to allow Mr. Reese, using another name, to view the properties. Mrs. Clement suggested that they meet at 538 Middlewood at 11 a.m., Thursday, June 11th. It should be noted that 538 Middlewood was the same home which Mrs. Clement said she had "terrible difficulty" obtaining the keys from the tenant for inspection.

When Mr. Reese arrived for his appointment on June 11th, he brought with him a friend, Nancy Cameron, who is white. Ms. Cameron was introduced as his wife. The object of the exercise was to find out if the home would be rented to whites. In the result, after Mr. Reese and Ms. Cameron inspected the home, they were assured by Mrs. Clement that it was available. They did not view 546 Middlewood.

How does one account for the fact that 546 Middlewood was held out by Mrs. Clement as being available? The lease application for that home had been signed by Mr. and Mrs. Heffernan on June 10th. The answer, I believe, lies in the nature of renting homes in a highly desirable area. Both Mrs.

Clement and Mr. Davies testified to just how quickly homes can be rented in Orchard Park. The Respondent Company, quite naturally, was under some pressure to place a new tenant just as soon as the former tenant left so that there would be an uninterrupted flow of rent. In the result, there was no commitment on the part of the Respondent Company to any applicant until the application for lease were approved and the lease executed.

Mr. Reese and Ms. Cameron inspected 538 Middlewood at 11 a.m. on June 11th. It was that very day that the application for 546 Middlewood was approved, and it was not until the next day, June 12th, that the lease, itself, was executed. It was probably quite true that 546 Middlewood was available for rent on the morning of June 11th. This was a seller's market, and Mrs. Clement was taking no chances.

The properties in question were, however, not available to Mrs. Reese. This point was reenforced when Mrs. Reese visited Mrs. Clement on June 9th, the day after her husband was informed that the very properties which had been denied to Mrs. Reese were indeed available. Mrs. Reese brought with her a co-worker and friend, Ms. Katherine Harvey. Mrs. Reese asked if the keys for 34 Brentwood had been obtained. Mrs. Clement responded that the tenants were away from the city and would not return for about a week, a fact which simply does not square with the early June rental of the property to another. And, as for 538 and 546 Middlewood, Mrs. Clement said they were not for rent. Ms. Harvey corroborated Mrs. Reese's statement.

After her husband and Ms. Cameron actually inspected 538 Middlewood, Mrs. Reese telephoned Mrs. Clement. She confronted Mrs. Clement with the fact that her husband had viewed one of the properties that was held out as already having been rented. Mrs. Reese wanted to know why she was denied the opportunity to apply as a tenant. The answer given by Mrs. Clement was that the "people of Orchard Park are prejudiced." The home was not shown to Mrs. Reese because she is black.

Mrs. Reese contacted the London Realty Board, Legal Aid, and the Ontario Human Rights Commission soon after the conversation with Mrs. Clement. She also telephoned Mr. Davies, President of the Respondent Company. She complained that she was discriminated against in the rental of property

because of her race.

Mr. Davies recounted the telephone conversation with Mrs. Reese:

> "A. She called me on the telephone and complained that she had been refused this house because she was black, and I told her that we didn't discriminate against black people, and I was sure that this was not the case. And she became a little belligerent and threatened to sue me and which I told her that's your prerogative. If you want to sue me, you can sue me.
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> "Q. Do you recall anything else about the conversation?
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> "A. At that time I told her that it had been reported to me by Shirley Clement for about a period of three weeks in that summertime we were getting quite a few number of black people coming to look at our townhouses on weekends, and she thought that was strange because none of them ever asked to make out an application, or to rent one of those properties that they came to see.
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> "Q. What was the significance of that in your mind?
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> "A. We didn't know. We were perplexed.
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> "Q. Did you have any personal dealings in the day to day renting of the three units in question: 538 Middlewood, 546 Middlewood, and 34 Brentwood?
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> "A. No . . . ." [Transcript pp. 257-258.]

Mr. Davies at the time of the act of discrimination was the President of the Respondent Company. He had the power to overrule and correct wrong done by Mrs. Clement, even though he had given her authority to rent properties held by the Company. Mr. Davies certainly had a warning signal when Mrs. Clement reported to him about what she believed to be "quite a number of black people coming to look at [their properties]." Race was being injected as an element in the rentals. This was all the more significant because, while the Respondent Company had rented to blacks in other areas of the city, it had not rented to blacks in Orachard Park where it controlled the rental of at least twenty homes.

In my view, the evidence leads to the conclusion that Mrs. Clement refused to show Mrs. Reese rental properties because of her race. The direct effect of this was to deny Mrs. Reese the opportunity to apply for the rental of such properties. This act of discrimination was ratified by Mr. Davies, who was put on notice and had the opportunity to investigate the complaint of Mrs. Reese. Mr. Davies chose rather to endorse without question the authority he had placed in Mrs. Clement to rent as she saw fit.

The matter before me is not one where the Complainant established a prima facie case leaving it to the Respondents to rebut by carrying the burden of proof. [See, Ontario Human Rights Commission v. Borough of Etobicoke, (1982) 132 D.L.R. (3d) 14 (S.C.C.) at 19-20.] Rather, the evidence clearly demonstrates the act of discrimination condemned by the Code. There is the direct evidence of Mrs. Reese which is both credible and consistent. Moreover, that evidence was corroborated by the witnesses Harvey and Cameron. On the other hand, the evidence is Mrs. Clement was not consistent, and it certainly was not corroborated by the testimony of either Mrs. Heffernan or Mr. Davies.

In the result, I am led to the conclusion that Sections 3(1)(a) and 3(1)(b) of the Ontario Human Rights Code were violated by the named Respondents. In saying this, I find that there was an intent to discriminate by Mrs. Clement. She knowingly refused to show properties to Mrs. Reese because of race. In this regard, Mrs. Clement was placed in a position of authority by the Respondent Company, and by Mr. Davies as the President of that Company to rent properties as she saw fit. Orchard Park was an area where blacks did not live, according to the Respondents who then controlled about twenty rental properties in Orchard Park. They had not rented Orchard Park properties to blacks in the past; they were sensitive to what they felt were an unusual number of black inquiries in the area.

It is not necessary for me to deal with the question as to whether the Respondents would be liable absent a showing of intent. [See, (1985) O'Malley v. Simpsons-Sears, S.C.C. unreported]. Nor do I have to deal with questions relating to indirect corporate liability. Intent has been established, and Mrs. Clement clearly was given authority to rent as she saw fit on behalf of the Respondent Company. [See, Canadian Dredge & Dock Co., Ltd. v. The Queen (1985) 19 D.L.R. (4th) 314 (S.C.C.).]

I come now to the question of damages. Though it was stated earlier, I repeat here: There is liability for the act of discrimination that flows directly to Mrs. Clement, Mr. Davies, and the Respondent Company. There is joint and several liability for the damages that are to be awarded.

Mrs. Reese sought rental accommodations for her family. She took time from work to find housing. There is no question that 34 Brentwood, the very first property that Mrs. Reese saw, and one which Mrs. Clement indicated could have been adapted to the Reese family needs, was denied her because of race. Mrs. Reese spent a portion of Monday, June 8th, away from work for her appointment with Mrs. Clement.

Thereafter, Mrs. Reese pursued other properties in Orchard Park handled by the Respondent Company, namely, 538 and 546 Middlewood. She took time from work to determine if these properties might be made available. I refer specifically to the meeting Mrs. Reese had with Mrs. Clement at the Respondent Company.

In addition, after it became clear that the Respondent Company would not rent to Mrs. Reese because of race, time had to be taken from work to find accommodations. The total amount of time taken from work by Mrs. Reese to find accommodations that would not have been required but for the act of discrimination described in this decision was four half days involving a sum of $200.00. As special damages, this amount is ordered to be paid by the Respondents.

More importantly, however, are the general damages suffered by Mrs. Reese. Under the Ontario Human Rights Code, R.S.O. 1980, section 40(1)(b), I am authorized to make an award for general damages as to the mental anguish caused the Complainant up to $10,000.00. Such general damages include:

> insult or injury to dignity and self-respect;
> loss of the right to freedom from discrimination;
> pain and suffering;
> emotional upset.

There can be little doubt on the face of the record of the deep personal hurt caused Mrs. Reese by the act of discrimination. At the time of the incident, and for several weeks thereafter, Mrs. Reese was in a severe depression. Yet, it was a hurt that she tried to redress informally both

with Mrs. Clement and Mr. Davies. It was one for which she sought immediate redress by employing counsel, and when that failed, after incurring personal expense, she went to the Ontario Human Rights Commission. Though the act of discrimination occurred in 1981, it was one that even in 1985 at the time of this Board of Inquiry weighed heavily and continued to hurt.

This is not a matter which calls for minor general damages. Rather, it is a matter which calls for a substantial award to reflect and redress the emotional hurt caused Mrs. Reese. Accordingly, I enter an award in the amount of $2,500.00. I do this not to punish, but rather to redress the wrong that has been done.

Finally, pre-judgment interest from the date of the issuance of the complaint in this matter is awarded.

I will remain seized of the matter should any dispute arise concerning the implementation of the terms of this award.

AWARD

For the reasons stated above the following is awarded:

1. The Respondents are jointly and severally liable for discriminating against the Complainant, Mrs. Reese, in violation of sections 3(1)(a) and 3(1)(b) of the Ontario Human Rights Code.

2. By way of special damages, the Respondents shall pay to Mrs. Reese the amount of $200.00.

3. General damages in the amount of $2,500.00 shall be paid by the Respondents to Mrs. Reese.

4. Pre-judgment interest, dating from the issuance of this complaint shall be paid to Mrs. Reese on the special and general damages awarded.

5. I will remain seized of this matter should any question arise concerning the implementation of this Award.

Dr. D.J. Baum
Board of Inquiry

DATED THIS 14th DAY OF JANUARY, 1986 AT TORONTO, ONTARIO.